A

Samat bin Yamin v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPLICATION NO 07–8–06 OF 2022 (B)
VERNON ONG, ZABARIAH YUSOF AND RHODZARIAH BUJANG FCJJ
5 OCTOBER 2022

C

Criminal Procedure — Bail — Security Offences (Special Measures) Act 2012 ('the SOSMA') — Whether s 13 of SOSMA denying bail to any person charged with security offence except one who was aged below 18 years, a woman or a sick or infirm person was unconstitutional for being discriminatory — Whether s 13 D *violated equality principle enshrined in art 8 of Federal Constitution — Whether despite being discriminatory, s 13 SOSMA was valid as the discrimination was based on reasonable and permissible classification founded on intelligible differentia that had a nexus to the objective of SOSMA itself*

E The applicant was charged under ss 26A and 26D of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the ATIPSOM') — for the offences of smuggling of migrants and of profiting from that activity — which offences were classified as security offences under the First Schedule of the Security Offences (Special Measures) Act 2012 ('SOSMA'). As a result, F pursuant to s 13 of SOSMA, the applicant was denied bail and was detained in prison pending trial on those charges. The applicant's applications for bail, first to the High Court and then to the Court of Appeal, failed. The instant application to the Federal Court was his final attempt to obtain bail. The application was premised on the grounds that: (a) ss 26A and 26D of G ATIPSOM did not fall within the ambit of SOSMA; (b) s 13 of SOSMA (concerning bail) was unconstitutional for contravening arts 5, 8 and 121 of the Federal Constitution ('the FC'); (c) the applicant's medical conditions (heart and kidney problems, high cholesterol, hypertension, gout and osteoarthritis in the knee) plus his age (56 years) increased his chances of H contracting Covid-19 infection if he continued to remain in prison; (d) he was a first offender and there was no risk of his absconding; and (e) he was the sole breadwinner in his family (his wife had passed away) and he had three children — aged 29, 23 and 12 years — and a two-year-old grandchild to care for (the grandchild's father was remanded and charged together with the applicant). I The applicant's main argument centred on the constitutionality of s 13 of SOSMA which provided that bail shall not be granted to a person who had been charged with a security offence unless that person was below 18 years of age, a woman or a sick and infirm person. In those three cases, s 13(2) provided that bail might be granted if the offence was not one which fell under Chapter

VIA of the Penal Code and the Special Measures Against Terrorism in Foreign Countries Act 2015. The applicant submitted that s 13 of SOSMA breached the doctrine of proportionality as well as the principle of equality enshrined in art 8 of the FC because it was discriminatory. In particular, the applicant questioned why s 13(2) of SOSMA treated a female suspect, as opposed to a male suspect, with leniency. In reply, the respondent submitted that there was no violation of art 8 because intelligible criteria dictated that persons aged below 18 years, women and those who were sick or infirm should be treated differently from others. The respondent referred to a report done by the Women, Human Rights and Gender Section of the Office of the High Commissioner for Human Rights, Rule of Law, Equality and Non-Discrimination branch of the United Nations and another report from a Justice Commission in Pakistan to support his submission that women were often subjected to a much greater variety of physical and mental abuse than men while they were under preventive detention. The respondent said the reason why SOSMA denied bail was to prevent suspected offenders from absconding, removing or destroying evidence or intimidating or causing harm to potential witnesses.

Held, unanimously dismissing the bail application:

(1) A discriminatory law was valid if it was based on a reasonable or permissible classification which was based on an intelligible differentia that had a nexus to the objective of the law itself (see para 16).

(2) There was cogent evidence from the reports of the United Nations group and the Pakistan Justice Commission, relied upon by the respondent, which justified the legislative intent in our case to allow a woman charged under SOSMA to be offered bail. It was more common for male accused persons, rather than female accused persons, to jump bail. So, the discrimination in granting bail based on gender was both reasonable and permissible because it was founded on intelligible differentia which had a rational nexus to the object of SOSMA. The purpose of refusing bail was to ensure that those accused of crimes under SOSMA were not given the opportunity to scuttle the investigations and the ensuing trial by absconding or interfering with the witnesses who would be called (see paras 17–20).

(3) As for the granting of bail to persons aged below 18 years and to sick or infirm persons, the rationality in treating such persons differently from other offenders was obvious in itself, again with the object of SOSMA in mind. It could not be that any illness would be a ground for granting bail. It was for the Court to decide based on the degree of illness and infirmity of the accused person, backed by medical evidence, whether it was just and fair in all the circumstances to grant such persons bail pending trial. Run-of-the-mill illnesses, such as those specified by the applicant, and

which were not even life-threatening, could not justify the granting of bail. In this regard, the medical report that the applicant had exhibited to his affidavit supporting his application was in respect of his condition on 8 August 2018 and not when his application was made on 3 June 2022. Also, there was evidence that the applicant was receiving treatment from the government health clinic and the prison authorities had also given an undertaking that his medical requirements would be attended to (see para 21).

(4) The proportionality test had been satisfied in that the harshness of SOSMA in denying bail to persons charged under it was justified by the Act's very object of ensuring national security, peace and public order (see para 22).

(5) The applicant's contention that ss 26A and 26D of ATIPSOM did not come within the ambit of SOSMA had no merit as it was clear that the offences with which the applicant was charged posed a threat to public order and national security. The legislative intent in listing ss 26A and 26D under Part IIIA of ATIPSOM and then including Part IIIA in the First Schedule of SOSMA was glaring. It was not open to the court to question in Parliament's wisdom in doing so (see paras 24–27).

[Bahasa Malaysia summary

Pemohon telah dituduh di bawah ss 26A dan 26D Akta Antipemerdagangan Orang dan Antipenyeludupan Migran 2007 ('AAOAM') — atas kesalahan penyeludupan migran dan mengaut keuntungan daripada aktiviti tersebut — yang mana adalah kesalahan diklasifikasikan sebagai kesalahan keselamatan di bawah Jadual Pertama Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 ('AKK'). Akibatnya, menurut s 13 AKK, pemohon telah dinafikan ikat jamin dan telah ditahan di penjara sementara menunggu perbicaraan atas pertuduhan tersebut. Permohonan pemohon untuk jaminan, pertama ke Mahkamah Tinggi dan kemudian ke Mahkamah Rayuan, gagal. Permohonan semasa ke Mahkamah Persekutuan adalah percubaan terakhirnya untuk mendapatkan jaminan. Permohonan tersebut dibuat atas alasan bahawa: (a) ss 26A dan 26D AAOAM tidak termasuk dalam lingkup AKK; (b) s 13 AKK (berkenaan jaminan) adalah tidak berperlembagaan kerana melanggar perkara 5, 8 dan 121 Perlembagaan Persekutuan ('PP'); (c) keadaan kesihatan pemohon (masalah jantung dan buah pinggang, kolesterol tinggi, hipertensi, gout dan osteoarthritis di lutut) serta umurnya (56 tahun) meningkatkan peluangnya untuk dijangkiti Covid-19 jika beliau terus kekal dalam penjara; (d) beliau adalah pesalah pertama dan tidak ada risiko beliau melarikan diri; dan (e) beliau adalah pencari nafkah tunggal dalam keluarganya (isterinya telah meninggal dunia) dan beliau mempunyai tiga anak — berumur 29, 23 dan 12 tahun — dan seorang cucu berusia dua tahun untuk dijaga (bapa cucunya tersebut ditahan reman dan didakwa bersama pemohon). Hujah utama pemohon tertumpu kepada keperlembagaan s 13 AKK yang memperuntukkan

bahawa jaminan tidak boleh diberikan kepada seseorang yang telah didakwa dengan kesalahan keselamatan melainkan orang tersebut berumur di bawah 18 tahun, seorang wanita atau orang yang sakit dan tidak sihat. Dalam ketiga-tiga kes tersebut, s 13(2) memperuntukkan bahawa ikat jamin mungkin dibenarkan jika kesalahan tersebut bukan kesalahan yang tertakluk di bawah Bab VIA Kanun Keseksaan dan Akta Langkah-Langkah Khas Menentang Keganasan di luar Negara 2015. Pemohon berpendapat bahawa s 13 AKK melanggar doktrin perkaraan serta prinsip kesaksamaan yang termaktub dalam perkara 8 PP kerana ia bersifat diskriminasi. Khususnya, pemohon mempersoalkan mengapa s 13(2) AKK melayan suspek wanita, berbanding suspek lelaki, dengan kelonggaran. Sebagai jawapan, responden berpendapat bahawa tidak ada pelanggaran perkara 8 kerana kriteria yang boleh difahami menetapkan bahawa orang yang berumur di bawah 18 tahun, wanita dan mereka yang sakit atau lemah harus dilayan secara berbeza daripada orang lain. Responden merujuk kepada laporan yang dibuat oleh 'Women, Human Rights and Gender Section of the Office of the High Commissioner for Human Rights, Rule of Law, Equality and Non-Discrimination' cawangan Pertubuhan Bangsa-Bangsa Bersatu dan satu lagi laporan daripada Suruhanjaya Kehakiman di Pakistan untuk menyokong hujahnya bahawa wanita sering mengalami pelbagai jenis penderaan fizikal dan mental yang lebih besar berbanding lelaki semasa mereka berada di bawah tahanan pencegahan. Responden menyatakan sebab AKK menafikan ikat jamin adalah untuk menghalang pesalah yang disyaki dari melarikan diri, mengalih atau memusnahkan keterangan atau menakut-nakutkan atau menyebabkan kemudaratan kepada bakal saksi.

Diputuskan, sebulat suara menolak permohonan ikat jamin:

(1) Undang-undang diskriminasi adalah sah jika ia berdasarkan klasifikasi yang munasabah atau dibenarkan yang berdasarkan perbezaan yang boleh difahami yang mempunyai hubungan dengan objektif undang-undang tersebut sendiri (lihat perenggan 16).

(2) Terdapat keterangan kukuh daripada laporan kumpulan Pertubuhan Bangsa-Bangsa Bersatu dan Suruhanjaya Kehakiman Pakistan, yang digunapakai oleh responden, yang mewajarkan niat perundangan dalam kes kami untuk membenarkan seorang wanita yang didakwa di bawah AKK ditawarkan jaminan. Ia adalah satu kebiasaan bagi tertuduh lelaki, berbanding tertuduh wanita, untuk dinafikan ikat jamin. Jadi, diskriminasi dalam memberikan jaminan berdasarkan jantina adalah munasabah dan dibenarkan kerana ia diasaskan pada perbezaan yang boleh difahami yang mempunyai hubungan rasional dengan matlamat AKK. Tujuan menolak ikat jamin adalah untuk memastikan mereka yang dituduh melakukan jenayah di bawah AKK tidak diberi peluang untuk menghalang siasatan dan perbicaraan dengan cara melarikan diri atau mengganggu saksi yang akan dipanggil (lihat perenggan 17–20).

(3) Bagi pemberian ikat jamin kepada orang yang berumur di bawah 18 tahun dan kepada orang yang sakit atau kurang upaya, rasional dalam memperlakukan orang tersebut secara berbeza daripada pesalah lain adalah jelas dengan sendirinya, sekali lagi dengan matlamat diambilkira. Tidak mungkin sebarang penyakit akan menjadi alasan untuk memberikan jaminan. Ia adalah terpulang kepada Mahkamah untuk membuat keputusan berdasarkan tahap penyakit dan kelemahan orang yang dituduh, disokong oleh keterangan perubatan, sama ada adil dan saksama dalam semua keadaan untuk membenarkan orang tersebut diikat jamin sementara menunggu perbicaraan. Penyakit 'run-of-the-mill', seperti yang dinyatakan oleh pemohon, dan yang tidak mengancam nyawa, tidak dapat mewajarkan pemberian jaminan. Sehubungan itu, laporan perubatan yang telah dikemukakan pemohon dalam afidavit yang menyokong permohonannya adalah berkenaan dengan keadaannya pada 8 Ogos 2018 dan bukannya semasa permohonannya dibuat pada 3 Jun 2022. Selain itu, terdapat keterangan bahawa pemohon sedang menerima rawatan daripada klinik kesihatan kerajaan dan pihak penjara juga telah memberi akujanji bahawa keperluan perubatannya akan dipenuhi (lihat perenggan 21).

(4) Ujian kekaraan telah dipenuhi kerana kekasaran AKK dalam menafikan jaminan kepada orang yang dituduh di bawahnya adalah wajar oleh matlamat Akta untuk memastikan keselamatan negara, keamanan dan ketenteraman awam (lihat perenggan 22).

(5) Pendapat pemohon bahawa ss 26A dan 26D AAOAM tidak termasuk dalam lingkungan AKK tidak mempunyai merit kerana jelas bahawa kesalahan yang didakwa oleh pemohon menimbulkan ancaman kepada ketenteraman awam dan keselamatan negara. Niat perundangan dalam penyenaraian ss 26A dan 26D di bawah Bahagian IIIA AAOAM dan kemudian memasukkan Bahagian IIIA dalam Jadual Pertama AKK adalah jelas. Mahkamah tidak terbuka untuk mempersoalkan niat Parlimen dalam berbuat demikian (lihat perenggan 24–27).]

Cases referred to

Abdullah bin Atan v PP and other appeals [2020] 6 MLJ 727; [2020] 9 CLJ 151, FC (refd)

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1, FC (refd)

Application of Tan Boon Liat & Ors Tan Boon Liat, Re v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1977] 2 MLJ 18, FC (refd)

Application of Tan Boon Liat @ Allen, Re; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 2 MLJ 83 (refd)

Collector and District Magistrate v S Sultan AIR 2008 SC 2096, SC (refd)

Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener) [2004] 2 MLJ 257; [2004] 1 CLJ 701, FC (refd)

Dato' Seri Anwar bin Ibrahim v PP [1999] 1 MLJ 321, CA (refd)

Datuk Haji Harun bin Haji Idris v PP [1977] 2 MLJ 155, FC (refd)
Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213, CA (refd)
Johnson Tan Han Seng v PP; Soon Seng Sia Heng v PP; PP v Chea Soon Hoong; Teh Cheng Poh v PP [1977] 2 MLJ 66, FC (refd)
Koh Chin Wah v PP (Criminal Application No W-07–94–08 of 2019) (unreported), FC (refd)
Letitia Bosman v PP and other appeals (No 1) [2020] 5 MLJ 277; [2020] 7 CLJ 147, FC (refd)
Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal [2016] 2 MLJ 309, FC (refd)
Malaysian Bar & Anor v Government of Malaysia [1987] 2 MLJ 165, SC (refd)
Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo [2020] 1 MLJ 440; [2019] 10 CLJ 731, FC (refd)
Mohamad Roslan bin Marjo v PP [2019] 10 MLJ 104, HC (refd)
PP v Azmi bin Sharom [2015] 6 MLJ 751, FC (refd)
PP v Entiran a/l Durasamy and other cases [2022] 8 MLJ 900; [2021] 10 CLJ 902, HC (refd)
PP v Gan Boon Aun [2017] 3 MLJ 12, FC (refd)
PP v Khairuddin bin Abu Hassan & Anor [2017] MLJU 188; [2017] 4 CLJ 701, CA (distd)
PP v Pung Chen Choon [1994] 1 MLJ 566, SC (refd)
PP v Khong Teng Khen & Anor [1976] 2 MLJ 166, FC (refd)
Ravindran Anemalai v PP [2022] 1 LNS 125, HC (refd)
Sathiaseelan Sinneya & Ors v PP and other cases [2022] 1 LNS 209, HC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561; [2017] 5 CLJ 526, FC (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333, FC (refd)
Suresh Kumar a/l Velayuthan v PP [2020] 10 MLJ 549; [2020] 4 CLJ 270, HC (refd)

Legislation referred to

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ss 26A, 26D, Part IIIA
Child Act 2001
Courts of Judicature Act 1964 s 87
Criminal Procedure Code s 388(1)
Federal Constitution arts 5, 8, 8(1), (2), 9, 10, 13, 121, 149, 149(1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f)
Juvenile Court Act 1947
Legal Profession Act 1976 s 46A(1), 46A(1)(a)
Limited Acquisition Act 1960 s 400
Penal Code s 124L
Rules of the Court of Appeal 1994 rr 68, 72(4), 76
Rules of the Federal Court 1995 rr 2, 102(4), 106, 137

Security Offences (Special Measures) Act 2012 s 13, 13(1), (2), (2)(b), First Schedule

Ramkarpal Singh (with Sangeet Kaur Deo, Harshaan Zamani and Simranjit Kaur) (Karpal Singh & Co) for the applicant.

Mohd Dusuki bin Mokhtar (with Nahra bt Dollah) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Rhodzariah Bujang FCJ:

[1] The applicant in this matter before us was charged, following his arrest on 16 June 2020, under both ss 26A and 26D of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the Act'), which offences are listed in Part IIIA of the Act and by reason of the same, the First Scheduleof the Security Offences (Special Measures) Act 2012 ('the SOSMA') applies. Therefore, consequent thereof and by virtue of s 13(1) of SOSMA, he was detained in prison pending his trial. Aggrieved by that incarceration, the applicant, through his previous solicitor, filed an application for bail pending his trial in the High Court of Klang but which application was dismissed by the learned High Court judge. The same application was filed by his present solicitor in the Court of Appeal ('COA'), which was similarly dismissed as it upheld the preliminary objection of the respondents. Given that as an almost identical objection was raised before us, the details of it will be elucidated further and subsequently in this judgment, which is in respect of the same application for bail by the applicant. That application was heard by us on the 5 October 2022 and our decision to dismiss it was delivered at the conclusion of the said proceeding. Our reasons for doing so are as follows, but as indicated just now we would first deal with the said preliminary objection taken by respondents.

THE PRELIMINARY OBJECTION

[2] The said objection was grounded on three contentions of the respondents, to wit, that the applicant's application was incompetent as there was no appeal filed against its dismissal by the lower courts, that rr 102(4), 106 and 137 of the Rules of the Federal Court 1995 ('the FC Rules') cited by the applicant in his notice of motion for bail are not applicable and that it was an abuse of the court's process. In the COA, the same incompetency and jurisdictional issues, though framed under the relevant Rules of the COA, that is, rr 68, 72(4) and 76 were raised, but not the last ground on abuse of process. These grounds we gathered from the documents e-filed in the courts management system, as they were not highlighted by the parties in their written submissions before us. In this regard, it is salutary to note that it was held in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [1999] 1 MLJ 321 that a court of first instance's grant of bail or refusal to do so is not a final decision

that determines the right of the appellant in the outcome of his trial and therefore that decision is not appealable. That is also a view we subscribed to and we are fortified by the fact that this same court in *Koh Chin Wah v Public Prosecutor* (Criminal Application No W-07–94–08 of 2019) (unreported) did hear a similar bail application by the applicant in the said case who was also charged under s 26A of the Act. Although that application of *Koh Chin Wah* was allowed by this court, the reasons for doing so are not known because there were no grounds of judgment delivered. However, the obvious and undeniable inference is that by hearing his application, this court had a 'fortiori' considered itself competent and has the jurisdiction to hear the same. There is no good or cogent reasons for us to depart from that stand for the respondent's preliminary objection in the said case was also dismissed. We also failed to see in what way the court's process was abused by the applicant here who merely wanted to have his freedom whilst awaiting his trial and when we considered the fact that his application was filed on 3 June 2022, whereas *Koh Chin Wah*'s case) was decided on 22 December 2020, the applicant therefore had every reason to believe that this application of his is a proper legal recourse to end his incarceration pending his trial, thus abusing the courts process he did not.

[3] As for the non-applicability of the said FC Rules, of course r 102(4) is definitely so because it concerns this court's power to vary or discharge an order made by a single judge of the Federal Court since 'judge' is defined under r 2 as such and there is definitely no such an order before us here. However, both rr 106 and 137 have bestowed upon this court the power to hear this application given the express words used in them and which for clarity, we would reproduce below:

> Rule 106 of the RFC provides:
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> Ancillary powers of the Court
>
> The Court shall exercise, for all purposes incidental to or arising from *any application* or appeal, all the powers which, under the provisions of any written law in force in the place of trial instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the Court.
>
> Rule 137 Inherent powers of the Court
>
> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any *application* or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court. (Emphasis added.)

Obviously, from the word 'application' as emphasised above, this court's power as described above extends to any application made before it and the applicant's notice of motion is definitely covered by the said Rules. With respect to the learned senior federal counsel ('SFC'), there is nothing in r 106 which indicates that this court's power in confined only to criminal appeals. As for his

contention that r 137 is a subsidiary legislation which should not override s 87 or the Courts of Judicature Act 1964, which is this court's power to hear and determine criminal appeals, the simple answer to that has been given earlier, that is, the granting and refusal of bail by the High Court is not appealable and as held in *Dato' Seri Anwar bin Ibrahim*'s case we have the inherent jurisdiction to prevent injustice and abuse of powers for we are not just a court of law but also a court of justice as well.

GROUNDS OF THE APPLICATION

[4] In the applicant's affidavit in support, he deposed the following factors for justifying the granting of his application and in order of their narration in it, they are:

(a) ss 26A and 26D of the Act do not come within the ambit of SOSMA;

(b) s 13 of the SOSMA is unconstitutional for, inter alia, being contrary to arts 5, 8 and 121 of the Federal Constitution;

(c) medical illness suffered by the applicant such as heart problem, kidney problem, high cholesterol, low blood pressure, gout and knee osteoarthritis. I paused here to note that in the next para 19 of his affidavit in support, the applicant states that he had recently suffered from high blood pressure. These illnesses except the knee osteoarthritis according to him, only happened during his incarceration. These illnesses coupled with his age (56 years) put him, deposed the applicant further, in the high category list for Covid-19 infection;

(d) a first offender with no risk of absconding; and

(e) sole breadwinner of the family (for his wife passed away during his remand) with three children aged 29, 23 and 12 years old, respectively and a grandchild aged two years whose father (his son-in-law) was remanded and charged with him.

[5] However, obvious from both the oral and written submissions of learned counsel for the applicant, the main thrust of his arguments against his client's continued incarceration rests on the constitutionality of s 13 of the SOSMA, which therefore prompts us to deal with it first. The said provision reads as follows:

13 Bail

(1) Bail shall not be granted to a person who has been charged with a security offence.

(2) *Notwithstanding subsection (1)* —

(a) a person below the age of eighteen years;

(b) a woman; or

(c) *a sick or an inf irm person*,

charged with a security offence, other than an offence under Chapter VIA of the Penal Code [Act 574] and the Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770], *may be released on bail* subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code. (Emphasis added.)

[6] That absolute prohibition in s 13(1), though qualified in sub-s (2) is, according to learned counsel, in breach of the equality principle enshrined in arts 8(1) and (2) of the Federal Constitution because of two reasons, ie, firstly, the restriction of court's power to grant bail is discriminatory and does not satisfy the reasonable classification test. Secondly, that restriction is in breach of the doctrine of proportionality. On the first reason, learned counsel submitted it was so because only persons who fall under the categories specified in s 13(2) would be granted bail and there is gender discrimination because a woman charged with the said offence can apply and be granted bail but for a man, only if he falls under the said specified categories in s 13(2). Learned counsel cited this court's decision in *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal* [2016] 2 MLJ 309 as authority for the proposition that in order to determine whether the said restriction is discriminatory, the court must adopt the reasonable classification test. The said cited case concerns the right of the respondent, a non-Muslim though academically qualified in Syarie Law, to be admitted to practice it as a 'Peguam Syarie' and this court, in deciding by a majority that the decision of the applicant to deny her of the same was legally valid, made reference to the same point of discrimination based on the equality provision in art 8. Paragraph 45 of the majority judgment by Raus Sharif, PCA (as His Lordship then was) which is illuminating on this point is reproduced in full below.

[45] The law on art 8 of the Federal Constitution is settled. *A law that discriminates is good law if it is based on reasonable or permissible classification*. The governing principles of law on art 8 of the Federal Constitution was succinctly laid down in the case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 where His Lordship Suffian LP in referring to the Indian Supreme Court case of Shri Ram Khrisna Dalmia v Shri Justice SR Tendolkar & Ors AIR 1958 SC 538, held *that a law that discriminates is good law if it is based on reasonable or permissible classification.* Two conditions must be satisfied, that is:

(a) the classification is founded on an intelligible differentia which distinguished persons that are group together from others left out of the group; and

(b) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on difference bases such as geographical, or according to objects or occupation and the like.

A

> What is necessary is that there must be a nexus between the basis of classification and the object of the law in question. (Emphasis added.)

B

[7] It has already been alluded to in *Public Prosecutor v Khairuddin bin Abu Hassan & Anor* [2017] MLJU 188; [2017] 4 CLJ 701 and it is beyond dispute that SOSMA's purpose and object is to combat terrorism and s 13 thereof is to ensure that those charged with offences under it would not abscond or interfere with evidence and/or witnesses as rightly submitted by the applicant's counsel. However, learned counsel for the applicant contended that the restriction based on gender here does not satisfy the reasonable classification test and therefore s 13(2) have breached the principle of equality under arts 8(1) and (2). Thus, he submitted it is unconstitutional and invalid given that the court's judicial power to grant bail is restricted by the said s 13(2).

C

D

[8] In respect of the applicant's second ground on this issue which is a breach of the doctrine of proportionality, learned counsel begins with a quotation from this court's decision in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1, which we would reproduce below, with the relevant excerpts highlighted:

E

> [127] To summarise, the following principles may be discerned from the above authorities:
>
> (a) art 5(1) embodies the presumption of innocence, which places upon the prosecution a duty to prove the guilt of the accused beyond a reasonable doubt;
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> F
>
> (b) the presumption of innocence is not absolute. A balance must be struck between the public interest and the right of an accused — art 8(1);
>
> (c) a statutory presumption in a criminal law, which places upon an accused the burden of disproving a presumed fact, must satisfy the test of proportionality under art 8(1). The substance and effect of the presumption must be reasonable and not greater than necessary;
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> G
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> (d) *the test of proportionality comprises three stages*:
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> H
>
> (i) *there must be a sufficiently important objective to justify in limiting the right in question*;
>
> (ii) *the measure designed must have a rational nexus with the objective; and*
>
> (iii) *the measure used which infringes the right asserted must be proportionate to the objective.*
>
> I
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> (e) factors relevant to the proportionality assessment include, but are not limited to, the following:
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> (i) whether the presumption relates to an essential or important ingredients of the offence;

(ii) opportunity for rebuttal and the standard required to disprove the presumption; and

(iii) the difficulty for the prosecution to prove the presumed fact;

(f) a significant departure from the presumption of innocence would call for a more onerous justification. (Emphasis added.)

Learned counsel then posed these questions:

> The question that arises as a result is whether it is fair for Parliament to completely deprive bail to a fit and healthy man charged with a security offence while granting privilege to a female charged with a security offence to apply and to be granted bail under section 13(2)? Another pertinent question to be answered at this juncture is whether it is fair and proportionate for Parliament to restrict the courts' judicial powers in granting bail to only categories under section 13(2) SOSMA and not to other persons ie, fit and healthy male accused persons?

Which he answered in para 53 of his written submission as follows:

> 53. It is submitted that such a deprivation of a fundamental liberty is far from fair but instead, draconian, particularly when there is no legal basis for the same. There can be no other reason to deny a male accused person of his freedom if not for a complete disregard for his fundamental basic human rights and the powers of the judiciary.

[9] In response to the above submission on the constitutionality of s 13(2), the learned senior federal counsel ('SFC') first cited a number of our apex court's decisions listed below on the presumption that a law passed by Parliament is constitutional unless proven otherwise and the burden of proof rests on the party challenging the said law to prove it is not so. The cases are:

(a) *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566;

(b) *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12; and

(c) *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751.

Article 8, submitted the learned SFC further, is not absolute or universal in application to everyone in all circumstances for the guarantee on equality is only for person in the like circumstances as held by this court in *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166 which was affirmed in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257; [2004] 1 CLJ 701 as well as in the earlier decision of this court in *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 (cited in *Majlis Agama Islam*'s case). In the words of Suffian LP in *Datuk Haji Harun*'s case:

> In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide different rights and

liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a Magistrate's court, others in a Session Court, and yet others in the High Court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those of another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment in none of these cases can the law be said to violate art 8. *All that art 8 guarantees is that a person in one class should be treated the same as another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on.* (Emphasis added.)

[10] Based on the case authorities which he had cited above, the learned SFC submitted that s 13(2) does not discriminate and violate the principle of equality guaranteed under art 8 of the Federal Constitution because, in his words:

30. A woman charged and detained under SOSMA are of unequal comparison and cannot be equated with a man that is charged and detained under SOSMA as they clearly possess different characteristics and criteria, and hence should reasonably be placed under a different classification altogether.

31. A woman accused and detained under SOSMA cannot be compared to a man accused and detained under SOSMA just like a sick or an infirm person charged under SOSMA too cannot be compared with a healthy person charged under SOSMA simply because they clearly have different criteria and are in different classifications.

[11] Alternatively, submitted the learned SFC further, even if the court finds s 13(2) discriminatory, it is still good law because it does not violate the principle of equality under art 8 due to the reasonable classification of persons made under the said provision based on *Datuk Haji Harun*'s case which was also adopted in the *Malaysian Bar & Anor v Government of Malaysia* [1987] 2 MLJ 165 and which case, we wish to reiterate here, held that when the discrimination in the law is based on reasonable or permissible classification it is still a good and valid law. The trite law is that the said classification is determined based on two conditions, as laid out earlier from the judgment of *Datuk Haji Harun*'s case as quoted in *Majlis Agama Islam*'s case.

[12] In the *Malaysian Bar*'s case the alleged discrimination was the prohibition against a lawyer of less than seven years practice from becoming a member of the Bar Council, a member of the State Bar Committee and the Committees established under them. The Supreme Court held that the said condition is permissible based on intelligible differentia and there is a rational nexus between the said condition in s 46A(1)(a) of the Legal Profession Act 1976 and its objective, which is, that the Malaysian Bar be governed by more

experienced lawyers. Therefore, the Supreme Court held that the said durational classification was a reasonable one. Based on the authority cited above and the Court of Appeal's explanation in this case now before us as to what constitutes intelligible differentia, the learned SFC submitted that s 13(2) satisfies that element as the classification therein is based on characteristic or criteria, which is clear, understandable, acceptable and is 'intelligible'.

[13] In addition to the above authorities, the learned SFC also referred to and relied on two publications which we will make further reference to later in this judgment. Based on the above publications, the learned SFC submitted that it is justifiable and reasonable to accord the leniency on bail to women for it is almost out of the ordinary for women to abscond from trial or disrupt the investigation process.

[14] Further on this issue of constitutionality of the alleged impugned provision, the respondent's firm stand is that the impugned provision is not in violation of art 8 of the Federal Constitution based on the proportionality test as explained by the COA in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 which is that a Legislative or Executive response to a state of affairs must not only be objectively fair but must be proportionate to the object sought to be achieved, otherwise that action can be struck down. The said test was applied by this court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 which concerns s 46A(1) of the Legal Profession Act 1976. That provision disqualifies a Member of Parliament from being a member of the Bar Council or a Bar Committee and this court decided that the said provision does not violate art 8 of the Federal Constitution. The learned SFC submitted that the same is true in our case here as the threefold analysis to determine the test of proportionality as applied in *Sivarasa*'s case in para 29 has been met and that paragraph reads as follows:

> [29] In *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, Lord Steyn adopted what was said in *de Freitas*:
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> The contours of the principle of proportionality are familiar. In Elloy de *Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1991] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
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> Whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'

His justification for stating so is based on the then Minister in the Prime Minister's Department winding up speech on the SOSMA Bill as reported in the Hansard of Dewan Rakyat dated 17 April 2012 which explains the seriousness of the offences under SOSMA, its preventive aim to combat

A security offences, the devastating effect of these offences and the fact that the limited right for bail was meant to cater to the worrying effect of such security offences. Thus, it is obvious, said the learned SFC, that s 13(2) is intended to limit a person's eligibility for bail in order to ensure that a person charged under a security offence would have a smaller window and opportunity to escape, to B remove or destroy available evidence or imposed threats of violence by committing criminal acts such as murder. In other words, given its preventive nature, it is, therefore, reasonable to limit the right of bail to the persons stated in the said provision. Thus, it meets the proportionality test and so art 8 is not violated. The learned SFC in this regard also highlighted two High Court's C decision on the exact same impugned provision, which are *Ravindran Anemalai v Public Prosecutor* [2022] 1 LNS 125 and *Sathiaseelan Sinneya & Ors v Public Prosecutor and other cases* [2022] 1 LNS 209 where in both decisions, the said provision is held to be constitutionally valid as it is based on a classification that D is both reasonable and proportionate. However, it is also to be noted, as highlighted by learned counsel for the applicant in his written submission, that the High Court in *Public Prosecutor v Entiran a/l Durasamy and other cases* [2022] 8 MLJ 900; [2021] 10 CLJ 902 had decided to the contrary, holding that the said impugned provision '... is not only discriminatory as E devoid of any rationale or reasonable classification or differentiation but goes against the non-gender discrimination or equality provision in art 8 of the Federal Constitution'. The learned judicial commissioner then held that the word 'women' in s 13(2)(b) must be defined to include 'men'.

F **[15]** Bearing the aforesaid submissions in mind, in coming to our decision which was adverse to the applicant, we did not ignore but instead had first and foremost at the forefront of our minds the equality provisions in art 8(1) and (2) of our Federal Constitution which amongst others, do not permit gender discrimination in any law and the glaring provision in s 13(2), which at plain G sight appears to be so. Then again, what must be made clear is the proviso embedded in the opening words of art 8(2), that is, 'Except as expressly authorised by this Constitution ...'. That authorisation is, in the context of this application, art 149 which allows legislation to be promulgated though inconsistent with the provisions on fundamental liberties under art 5 (or art 9, H 10 and 13) provided the said legislation cites either one of the six matters enumerated in art 149(1)(a)until (f) in its recital. For the purpose of our judgment, that pertinent provision is sub-cl (a) which reads as follows:

> 149 (1) if an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation —
>
> I (a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or

That very provision is cited, including all the other sub-clauses, except sub-cll (c) and (e), in the preamble of SOSMA.

[16] As for the legal principles and considerations which the court must apply in determining whether the law is unconstitutional for being discriminatory, they are well settled and the same we had reproduced earlier from the written submissions of both the applicant's learned counsel and the learned SFC. The bottom line is a discriminatory law is valid if it is based on a reasonable or permissible classification, which is based on an intelligible differentia that has a nexus to the objective of the law itself.

[17] As cited by the learned SFC in his written submission and mentioned in passing by us earlier, there is cogent evidence from the study conducted by an august international body, no less than the United Nations, which justifies the legislative intent in our case to allow a woman charged under SOSMA to be on bail. The report prepared and published in September 2014 by the Women, Human Rights and Gender Section of the Office of the High Commissioner for Human Rights, Rule of Law, Equality and Non-Discrimination Branch, states as follows:

> Empirical evidence shows that women have a heightened vulnerability to mental and physical abuse during arrest, questioning and in prison. Many women detainees face inhuman and degrading treatment during arrest, interrogation and in custody including stripped naked, threats of rape, touching, 'virginity testing', invasive body searches, insults and humiliations of a sexual nature or even rape. Once imprisoned, women may be subjected to several forms of violence such as rape by other inmate and guards, forced into prostitution, touched in a sexual manner during frisks, watched while showering or using toilets and required to wear revealing prison uniforms.
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> Since the vast majority of prisoners are men, prison systems and prison regimes have historically been designed for men — from the architecture of prisons, to security procedures, to facilities for healthcare, family contact, work and training. As a consequence, a small number of prisons meet the specific needs of women prisoners. These prisons often do no provide gender-appropriate rehabilitation services including sexual and reproductive health, mental health services, substance abuse and counselling for victims of physical and sexual abuse, lack of which is often the cause of women offending in the first place.
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> Many problems women face after release from prison are similar to that of men, however women are likely to suffer particular discrimination and stigma. For example, female spouses often provide support to husbands in prison and upon release; women on the other hand tend to be shunned by their husband and are often rejected by their families. In some countries, they may even lose their parental rights.
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> The impact of imprisonment can be extremely severe if the prisoner is the primary carer of the children — a role that is still overwhelmingly held by mothers. Even a short period in prison may have damaging, long-term consequences for the children concerned. In many countries, because there are few female prison facilities difficulties arise in maintaining family relationships during custody, in violation of international standards.

[18] It is also worth reproducing another report, though not internationally done, by the Law of Justice Commission of Pakistan, also cited by the learned SFC, which justifies the release of a woman on bail pending trial which states as follows:

> The object of detaining a person accused of an offence is to avoid his absconding from inquiry or trial, or prevailing upon the witnesses by any manner or to disturb the investigation or defeat the trial. However, in the existing social setup of the society it is unusual for a woman to abscond from trial or influence or disturb the pace of investigation or trial; and perhaps this factor prevailed upon the legislature when it provided her the concession of bail in non-bailable offences, under the first proviso to Sub-section (1) of Section 497 Cr. PC. This concession was allowed more than hundred years before in British India.

[19] Although we do not have the statistics to back us up, but we could confidently state that in all of our years with the Judiciary, a female accused jumping bail is not as common an occurrence as that of a male accused. So, we could fully appreciate where the views expressed in the above-mentioned reports came from and the rationality of the same. Obviously, the discrimination based on gender here is in our view both reasonable and permissible because it satisfies the two conditions laid down *Datuk Haji Harun*'s case which is, that it is founded on an intelligible differentia and there is a rational nexus between the object of SOSMA which is clearly enacted for the prevention of acts prejudicial to public order and security of our nation or any part thereof as rightly stated by Collin Sequerah J (as His Lordship then was) in *Suresh Kumar a/l Velayuthan v Public Prosecutor* [2020] 10 MLJ 549; [2020] 4 CLJ 270 and the denial of bail to a person charged for any offence covered by it.

[20] We would further reiterate, as so rightly submitted by learned counsel for the applicant and stated earlier in para 6 above, based in *Khairuddin*'s case, although in our own words, the overarching importance of ensuring that those accused of the crimes under SOSMA would not be given the opportunity to scuttle the investigation and the ensuing trial of the case by absconding or interfering with the witnesses to be called in it. Given that deep concern, the United Nation's empirical study and the Commission of Pakistan's report highlighted earlier provides the rationality of allowing the said gender discrimination.

[21] As for the other leeway given to those below the age of 16 years, the rationality of this exception stares in our face for it is plain that there a special law governing juveniles accused for crime which is the Child Act 2001 and before that, its predecessor, the Juvenile Court Act 1947. As for a sick and infirm person, that too is beyond reproach because for one, it can safely be assumed that given the medical conditions suffered by such an accused person,

there would be a very much lesser risk of perpetuating the danger we mentioned above if freedom before and during trial is granted. Of course, the law does not specify exactly the extent and severity of the illness and infirmity which allows the granting of the said leeway, but again with the object of SOSMA in mind, it cannot be that any illness be a ground to exercise that right to bail for surely the severity of the medical conditions plays a major role in the court's consideration should an application be made on the said grounds. Thus, it is for the court to determine, based on the degree of the illness the accused person and the infirmity he suffered, backed no less by a conclusive medical evidence, that it would be just and fair for the person so charged to be freed on bail whilst awaiting the conclusion and decision of the court on the charge so preferred against him. Otherwise, it would make a mockery of the law should run of the mill illnesses, such as those specified by the applicant herein, be the justification to grant him the freedom he seeks given that the said illnesses are not even life threatening, although this we say without the slightest intention of belittling the said conditions, his fear of contracting Covid-19 infection and his family obligations as stated in para 3 of this judgment. Further, as highlighted by the learned SFC in his written submission and to which we have no reasons to disagree, the medical report exhibited to the applicant's affidavit in support from Klinik Elizabeth is in respect of his condition on 8 August 2018 and not his current one when the application was made on 3 June 2022. Furthermore, again as highlighted by him, the applicant has been under treatment from the Sungai Buloh Health Clinic with prescribed medications and the prison authority had given an undertaking to attend to his medical requirements. Thus, if his medical conditions and the situation so warrants, there is no prohibition for the applicant to make a fresh application to be so released.

[22] In respect of the doctrine of proportionality which is the other ground relied on by the applicant, again we are thoroughly convinced that the test prescribed by *Sivarasa*'s case which is reiterated in *Alma Nudo*'s case as highlighted by both the learned counsel and the learned SFC, respectively, have indeed been satisfied here given the very object of SOSMA and what it aims to achieve for the security and peace of our nation as per the winding speech of the said Minister when tabling the Bill for it which the learned SFC had drawn our attention to as stated in p 20 of this judgment. The same needs no repetition here but we would just like to re-emphasise that what we are here concern with is the whole peace and security of our nation, not just a segment of it and that it is an undeniable right, which every citizen in country expects and must enjoy. There is more than enough worldly historical events which demonstrate the extremely devasting effect on a nation when such peace and security are destroyed which we need not have to go into. Thus, the harshness of the law on the freedom of a person charged under SOSMA is one, which is militated and justified by the very aim that the said law is promulgated.

[23] As for the fact that this court had on *22 December 2020* granted bail to the applicant *Koh Chin Wah* in Criminal Application No W-07–94–08 of 2019 even though he was also charged under s 26A of the Act, the learned SFC submitted that without the grounds of decision for allowing the said application, the reasons for doing so were merely speculative as held by this court in *Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo* [2020] 1 MLJ 440; [2019] 10 CLJ 731. Furthermore, he said applying the cardinal principle of statutory interpretation based on the maxim *generalia specialibus non derogant*, which this court did in *Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727; [2020] 9 CLJ 151, s 388(1) of the Criminal Procedure Code does not apply given that SOSMA has laid down the specific procedures pertaining to bail. This court in *Abdullah bin Atan*'s case distinguished the application of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526 which should be done in this case as well, said the learned SFC, as there is no displacement of judicial power here, unlike in *Semenyih Jaya*'s case where the determination of the amount of compensation for compulsory land acquisition under s 400 of the Limited Acquisition Act 1960 rest not which the judge only but also with the two assessors who sat with him. It is to be noted that this court had done the same distinguishment fairly recently in *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277; [2020] 7 CLJ 147. We would pause here to say and without any need for further elaboration that we are definitely on all fours with the learned SFC on the points he had rightly and succinctly canvassed as stated in this paragraph of our judgment.

[24] Settling the above issues would by no means concludes this judgment of ours for there is a remaining one which is outstanding, and that is the applicant's contention that the provision he is charged under, that is ss 26A and 26D of the Act do not come within the ambit of SOSMA. Why that is so, according to his learned counsel is because although undisputedly ss 26A and 26D fall under Part IIIA of ATIPSOM and are defined as security offences under the First Schedule of SOSMA but that is not a blanket approval that all offences under the said Schedule be treated or considered as such, following the decision of the High Court in *Mohamad Roslan bin Marjo v Public Prosecutor* [2019] 10 MLJ 104 which held as follows:

> Notwithstanding the fact that offences under Part IIIA of the ATIPSOM under which s 26E was enacted, had been listed as security offence under the First Schedule of the SOSMA, it did not provide a blanket provision approval/categorically that all offences thereunder must be treated/considered/defined as security offence under the said Act. It was open to the defence to challenge whether any particular offence under the particular section under the First Schedule qualified to be considered as security offence for the purpose of a trial under SOSMA.

[25] Learned counsel then quoted at length the decision of the COA in *Khairuddin*'s case where the respondents were charged under s 124L of the Penal Code, which is also incorporated in the First Schedule of SOSMA. However, without a need to go any further, very clearly the facts in *Khairuddin*'s case are distinguishable because as expressly noted by the COA in para 43 of its judgment, s 124L of the Penal Code falls under cl 1(e) of art 149 of the Federal Constitution which clause is expressly excluded from the preamble of SOSMA, thus warranting the court's finding that there was 'ambiguity whether Parliament had intended to categorise and offence under s 124L of the Penal Code as a security offence'. There is no such ambiguity here and in this regard we are in complete agreement with the learned SFC that the offences under which the applicant are charged relate to the smuggling of migrants which is a threat to public order and his citation of the definition of public order in para 14 of the Supreme Court of India's decision in *Collector and District Magistrate v S Sultan* AIR 2008 SC 2096 is worth reproducing in our judgment. This, we would do together with para 13 of the said judgment as well as the two charges faced by the applicant, in order to better appreciate the significance of the applicant's alleged crime.

> 13. 'Public order' is what the French call 'ordre publique' and is something more than ordinary maintenance of law and order. The test to be adopted in determining whether an act affects law and order or public order, is: *Does it lead to disturbance of the current life of the community to amount to disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? (See Kanu Biswas v State of West Bengal (AIR 1072 SC 1656).*
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> 14. 'Public order' is synonymous with public safety and tranquility: 'it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State'. Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum, which includes at one end small disturbances and at the other the most serious and cataclysmic happenings (see *Dr Ram Manohar Lohia v State of Bihar and Ors* 1996 (1) SCR 709). (Emphasis added.)

The charges:

> *Bahawa kamu bersama-sama* di antara 17/05/2020 hingga 19/05/2020 bertempat di alamat No 602, Jalan Air Tawar, Taman Kejiranan Air Panas Setapak di dalam Wilayah Persekutuan Kuala Lumpur telah menjalankan penyeludupan migran bagi mencapai niat bersama. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 26A Akta Antipemerdagangan Orang dan Akta Antipenyeludupan Migran 2007 yang dibaca bersama-sama seksyen 34 Kanun Keseksaan.
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> *Bahawa kamu bersama-sama* di antara 17/05/2020 hingga 19/05/2020 bertempat di alamat No 602, Jalan Air Tawar, Taman Kejiranan Air Panas Setapak di dalam

> Wilayah Persekutuan Kuala Lumpur bagi mencapai niat bersama, kamu telah mendapat keuntungan daripada penyeludupan migran. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 26D Akta Antipemerdagangan Orang dan Akta Antipenyeludupan Migran 2007 yang dibaca bersama-sama seksyen 34 Kanun Keseksaan. (Emphasis added.)

[26] Bearing the above quotation in mind, in particular the highlighted portion, which is the question posed in the said cited case and the substance of the two charges faced by the applicant which shows that he was not acting alone when committing the alleged crime, we cannot dispute the learned SFC's cogent stand and conclusion as elucidated in paras 58 and 59 of his written submission, which are reproduced below:

> 58. Section 26A to section 26K falls under Part IIIA of ATIPSOM and create an offence relating to smuggling of migrants. Such acts post a threat public order. Smuggling activities are often syndicated and such activities caused an influx of illegal immigrants in and out of this country. Consequentially, it poses potential health risks or the importation of unknown disease into Malaysia. There would also be risk of introduction of rival trial activities imported from abroad. It follows that smuggling activities have the potential to disrupt even the tempo of the life in the community. Further, an influx of illegal migrants is also a threat to national security. Existing evidence points towards illegal migrants having conspired to provide information to intruders during the invasion in Lahad Datu (see *PP v Kadir Uyung & Anor & Other Appeals* [2–17] 1 LNS 1403).
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> 59. The applicant, as stated in the charge, was directly involved in actual smuggling of migrants and his culpability remains high. The incoming of illegal migrants has continue to rise, and the correlation between the influx and the act of smuggling is quite significant. Therefore, the respondent humbly submits that section 26A and 26D of ATIPSOM validly constitutes security offences within the meaning of Article 149(1) of the Federal Constitution.

Thus, given the rationale above, and in the context of the applicant's case here, the first part of the question posed in the said para 13 of *Collector and District Magistrate*'s case as highlighted above is to be answered in the positive and the second part in the negative.

[27] As for the use of the preamble, again we are in complete agreement with the learned SFC that resort to the preamble of an enacted law is only to be taken as an aid to interpret its provision only when the meaning of the said provision is unclear or doubtful. This has been made more than clear by this court in *Re Application of Tan Boon Liat & Ors Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1977] 2 MLJ 18 and in *Johnson Tan Han Seng v Public Prosecutor; Soon Seng Sia Heng v Public Prosecutor Public Prosecutor v Chea Soon Hoong; Teh Cheng Poh v Public Prosecutor* [1977] 2 MLJ 66 which quoted with approval the holding of Abdoolcader J in *Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83 at p 85 as follows:

> Although the preamble is a part of a statute, it is not an operating part thereof. The aid of the preamble can be taken only when there is some doubt about the meaning of the operative part of the statute. The preamble undoubtedly throws light on the intent and design of the enacting authority and indicates the scope and purpose of the legislation itself but it should not be read as a part of a particular section of that written law. Where the enacting part is explicit and unambiguous the preamble cannot be resorted to, to control, qualify or restrict it. The enacting words of the statute are not always to be limited by the words of the preamble and must in many instances go beyond it, and where they do so, they cannot be cut down by reference to it. It is accordingly clearly settled law that the preamble cannot restrict the enacting part of a statute though it may be referred to for the purpose of solving an ambiguity.

The legislative intent here is glaring given the listing of ss 26A and 26D of the Act in Part IIIA of the Act and the said Part is included in the First Schedule of SOSMA as we had mentioned in the opening sentence of this judgment. It is therefore not open for the court to question the wisdom of Parliament in passing this law given there is no ambiguity in its explicit intention to include the said offences under SOSMA.

[28] For all the reasons as stated above, we found no merits in the applicant's notice of motion, which therefore warrants its dismissal.

Bail application dismissed.

Reported by Ashok Kumar